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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 863

IN THE MATTER OF

MAGNUS, MABEE & REYNARD, INC.,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

IN THE MATTER OF

HURDMAN & CRANSTOUN,

PERCY C. MAGNUS,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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HURDMAN & CRANSTOUN,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals

for the Second Circuit, affirming the order of the United States District Court for the Southern District of New York.

Opinions Below

The opinion of the United States District Court for the Southern District of New York (App. 32a),* is not officially reported. The opinion of the United States Court of Appeals for the Second Circuit, decided December 6, 1962, has not yet been reported, but is reproduced in the appendix hereto beginning at page 1a.

Jurisdiction

The appeal to the Court of Appeals for the Second Circuit was decided December 6, 1962. The mandate thereon issued to the United States District Court for the Southern District of New York on December 27, 1962. The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C., Section 1254(1).

Question Presented

1. May the Federal prosecutor circumvent the limited pre-trial discovery procedures available to the government under the Federal Rules of Criminal Procedure by enforcement, after an indictment for alleged tax crimes, of an administrative Internal Revenue Service summons issued in the matter of the tax liability of the accused prior to indictment?

a) Is the Federal prosecutor in a pending Federal criminal case limited to the pre-trial discovery procedures available under Rule 17(c) of the Federal Rules of Crim-

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* Parenthetical references are to the appendix in the Court of Appeals.

inal Procedure, or may he also obtain additional discovery by resort to administrative process made and provided solely for administrative agencies?

b) May the Federal prosecutor, in a pending criminal case, utilize the broad investigatory procedures, available to an administrative agency, in order to obtain information, regardless of its evidentiary quality, in preparation for trial, when such information obtained by administrative process is clearly beyond the limitations imposed upon the government's right to pre-trial discovery under the applicable provisions of the Federal Rules of Criminal Procedure?

Statement

This is a Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, arising out of an affirmance by that Court of an order of the United States District Court for the Southern District of New York, denying petitioners' application and motion for an order quashing summonses issued by the Internal Revenue Service, pursuant to § 7602, Internal Revenue Code, 1954, requiring Hurdman & Cranstoun, Certified Public Accountants of New York City and Magnus, Mabee & Reynard, Inc., to produce records, etc., and to testify before a Special Agent of the Internal Revenue Service.

Internal Revenue Service summonses (App. 11a, 20a), were directed to Magnus, Mabee & Reynard, Inc. (hereinafter referred to as the corporation), and Hurdman & Cranstoun (hereinafter referred to as the accountants), requiring them to produce for examination and inspection a voluminous list of documents relating to the years 1948 through 1957, inclusive.

Both of the aforesaid summonses were issued on June 19, 1961 and are encaptioned In the Matter of the Tax Liability of Percy C. & Margaret A. Magnus, the former

being the person indicted and the president of the corporation to which one of the summonses was directed. Hurdman & Cranstoun is the accounting firm which acts as auditors to the corporation and which has also performed certain accounting services for the petitioner, Percy C. Magnus.

The summonses in question were the subject of an earlier special civil proceeding commenced in the United States District Court for the Southern District of New York, to which proceeding the corporation was not a party and in which proceeding the issues of fact and law were in no way similar to the novel legal question concerning the interpretation of the Federal Rules of Criminal Procedure and the administration of the Federal criminal law which is raised by the present petition.

The petitioner, Percy C. Magnus, whose tax liability is the subject of the aforementioned summonses, was indicted in April of 1962 in the Southern District of New York for alleged income tax offenses relating to the years 1955, 1956 and 1957. The gravamen of the charges in relation thereto is the individual's alleged wilful failure to file timely tax returns for these years.

The petitioning corporation is a large manufacturer and dealer in essential oils and allied products in the United States. The books and records of the corporation, which the Internal Revenue Service now requires to be produced, have previously been inspected by the Internal Revenue Service for the years 1948 through 1955 inclusive. On information and belief, the Internal Revenue Service has also previously inspected the books of the corporation for the year 1956. Neither the Secretary of the Treasury nor his delegate has, pursuant to the requirements of § 7605(b), Internal Revenue Code, 1954, notified the corporation in writing that an additional inspection of its books and records is necessary (App. 9a).

The petitioner, Percy C. Magnus, has filed income tax returns for the years 1948 through 1957, inclusive, and

all taxes lawfully due and owing thereon have been paid in full (App. 16a).

Compliance with the summonses in question had not been required until the present time by reason of the stays previously in effect in the earlier special civil proceeding. Subsequent thereto, compliance was demanded by the United States Attorney for the Southern District of New York by letter dated July 13, 1962, directed to the witnesses summoned (App. 22a).

The governmental agency most recently demanding compliance with the summonses (the office of the United States Attorney for the Southern District of New York) is the one whose primary function in connection therewith is to prepare and try the criminal case under the indictment now pending against the petitioner, Percy C. Magnus. At the time the summonses were issued in June of 1961, enforcement was sought by a Special Agent of the Internal Revenue Service, who was acting under the supervision of his superiors in the Treasury Department of the United States and who was ostensibly utilizing the summonses in question for the broad purposes indicated in § 7602, Internal Revenue Code, 1954.

The Special Agent of the Internal Revenue Service responsible for issuance of the summons in question, has now candidly stated that he was previously working under the supervision of his superiors in the Internal Revenue Service, but that in connection with the enforcement of these summonses he is now working with the Office of the United States Attorney in preparing for trial the pending criminal case against the petitioner, Percy C. Magnus (App. 24a).

It is petitioners' position that the decision below improperly permits the Federal prosecutor to utilize an administrative summons, intended as a mere investigatory tool, to circumvent the provisions of the Federal Rules of

Criminal Procedure limiting the Federal prosecutor's discovery, thus jeopardizing the fundamental rights of an accused under the Federal criminal rules.

Petitioners further submit that such use of the Internal Revenue summons is clearly outside the scope of § 7602, Internal Revenue Code, 1954, the statute authorizing such process.

Accordingly, petitioners seek reversal of the order of the United States District Court for the Southern District of New York, dated September 19, 1962, and direction of the entry of an order by said Court quashing the summonses in question and permanently staying the Internal Revenue Service from utilizing said summons or any information obtained thereby in connection with the criminal case now pending against petitioner, Percy C. Magnus, in the Southern District of New York.

REASONS FOR GRANTING THE WRIT

POINT I

The decision of the Court below permits the Federal prosecutor to circumvent and render a nullity the statutory limitations imposed upon the Government's right to pre-trial discovery in a pending Federal criminal case.

(a) Enforcement of the summonses violates the accused's right that prosecution pre-trial precedures in Federal criminal cases be governed by the provisions of Rule 17(c) of the Federal Rules of Criminal Procedure

Congress has mandated that the procedure with respect to Federal criminal prosecutions shall be governed by rules prescribed by the Supreme Court of the United States. Act of February 24, 1933 c. 119, 47 Stat. 904, as amended; Act of June 29, 1940, c. 445, 54 Stat. 688.

Pursuant to the foregoing enactment, this Court promulgated the rules now known as the Federal Rules of Criminal Procedure. The investigative power of the prosecution, insofar as compulsory process is concerned, is governed by Rule 17(c) of these rules. Rule 17(c) contains the only provision for discovery and inspection available to the prosecution. The provisions of Rule 17(c) of the Federal Rules of Criminal Procedure set forth a limited statutory procedure whereby the government, as well as a defendant in a Federal criminal case, may obtain pre-trial discovery. The provisions of Rule 17(c) provide a discovery for the government which is extremely limited in scope, and for example is not as broad as the discovery permitted only to the defendant under Rule 16 of the Federal Rules of Criminal Procedure. *United States* v. *Gross*, 24 F.R.D. 138 (S.D.N.Y. 1959).

Indeed, it is now well settled that in order to obtain a pre-trial discovery under Rule 17(c), the moving party, in this case the government, must meet specific and certain criteria in order to justify obtaining the information requested by subpoena. See, *United States* v. *Iozia*, 13 F.R.D. 335, 338 (S.D.N.Y. 1952). It is, therefore, clear that enforcement of the summonses here in question is sought to circumvent the statutory restrictions embodied in Rule 17 of the Federal Rules of Criminal Procedure, and constitutes an unlawful attempt to expand the bounds erected by this Court around the Federal prosecutor's right to pre-trial discovery.

To permit the government to use the administrative Internal Revenue Service summons for its present purpose would be to make available to the government a greater pre-trial discovery procedure than Congress vouchsafed to them under the Federal Rules of Criminal Procedure. *Application of Myers*, 202 F. Supp. 212 (E. D. Pa. 1962); *United States* v. *O'Connor*, 118 F. Supp. (D. Mass. 1953); Cf. *Campbell* v. *Eastland*, 307 F. 2d 478 (5th

Cir. 1962). Strong reasons of policy argue that the government should not be permitted discovery beyond that sanctioned by the Federal Rules:

> "The zealous prosecution of violations of the criminal laws is the business of the government. *But the zealous protection of the liberties of the people should be equally the concern of the government.*" (Emphasis supplied.) *Application of House*, 144 F. Supp. 95, 103 (N. D. Cal. 1950).

The precise problem before this Court, and decided as stated above in *United States* v. *O'Connor, supra*, was recently before a United States District Court in the Eastern District of Pennsylvania in *Application of Myers*, 202 F. Supp. 212 (E. D. Pa. 1962). There, the Court stated, in response to an application by a third party to quash a summons served upon him in reference to the tax matters of a taxpayer under indictment:

> "We believe the Government's purpose openly avowed, is contrary to our fundamental and deep-seated conceptions of fair play. See United States v. O'Connor, 118 F. Supp. 248 (D. C. Mass. 1953). *It aims to circumvent the policy of the Federal Rules of Criminal Procedure* which deny the Government the advantage of pre-trial discovery. Surely the United States should set the example of law observance. It should not oppress a defendant who stands accused of a crime and whose liberty is at stake or his prospective witness by invoking in aid of a criminal charge the processes which Congress has authorized for the administration of the revenue laws. *The Court will not permit evasion of the traditional procedure in criminal trials embodied in the Federal Rules of Criminal Procedure by resort to the great administrative powers in aid of the revenue laws which are granted by Section 7602 of the Internal Revenue*

Code of 1954 (26 U.S.C.A. § 7602). Such purpose of evasion clearly appears where, as here, the end sought is not the proper administration of the revenue laws but rather support for the charge against a defendant who is awaiting trial." (Emphasis supplied) (202 F. Supp. at 213)

In *Boren* v. *Tucker*, at 239 F. 2d 767, 773, the Court stated that it is ". . . against public policy for the Judicial branch of the government to lend its support to the use of an 'unrestricted' administrative subpoena power." The clear policy of the Courts, to the effect that a mere administrative *ex parte* summons which *Congress had authorized solely for administration of the revenue laws* must not and cannot be used to oppress a defendant whose very liberty is at stake and to evade the regulatory procedures established for criminal trials.

POINT II

The decision of the Court below is in error by reason of the fact that it permits the Internal Revenue Service to enforce an administrative summons for purposes outside the scope of the statute authorizing the issuance of such summonses.

Pursuant to Section 7602 of the Internal Revenue Code of 1954, the Internal Revenue Service seeks to enforce compliance with an administrative summons served on the petitioner corporation and the accountants, requiring them to appear and give testimony and produce for examination voluminous books, records and documents allegedly in the matter of the tax liability of the taxpayer presently under indictment for an alleged violation of the Internal Revenue laws for a period of three years (1955, 1956 and 1957). This three year period is included within the scope of the aforementioned Internal Revenue Service summonses (App. 11a, 20a).

When this criminal matter was forwarded from the Special Agent with recommendation for prosecution to the Regional Counsel's office, the Special Agent had thereupon concluded his phase of the case. The matter was then within the jurisdiction of the Regional Counsel's office who then forwarded the case to the Department of Justice. At this point discretion in the matter passed from the Treasury Department to the Justice Department, which was responsible for the criminal trial of the matter. When their recommendation for prosecution was made, the case was forwarded to the United States Attorney's office. See, Balter, *Fraud Under Federal Tax Law*, Chapter III (CCH 1953); American Law Institute, *Criminal Aspects of Tax Fraud Cases*, Ch. 4, 5 (1957).)

At this stage the investigative work of the Special Agent has long since been completed and his only task is then to assist the United States Attorney in the preparation of the case for trial (App. 24a), and often to sit with the United States Attorney during the course of the trial and possibly to appear as a witness on behalf of the government, or even of the taxpayer. It is clear, therefore, that, inasmuch as this matter has now reached a pre-trial status, the present efforts of the United States Attorney to enforce a purely administrative summons and to obtain additional information regarding the personal tax affairs of the taxpayer obviously relate solely to the pending *criminal* trial of this case (App. 24a).

For the government now to argue that the summonses here in question must be enforced since they may be used for civil tax purposes within the scope of § 7602, Internal Revenue Code, 1954, is clearly not dispositive of, or even relevant to, the novel issue here presented. The Special Agent of the Internal Revenue Service, who has been concerned with this case since it was under consideration at the initial administrative level of the Treasury Department, admitted in a moment of candor that enforcement of the present summonses was being sought for purposes of

preparing the pending criminal case against petitioner, Percy C. Magnus (App. 24a).

Accordingly, enforcement of the summonses was sought for purposes not authorized by law. The purposes for which the Internal Revenue Service may have its administrative summons enforced, none of which exist here, are set out in the statute as follows:

> "For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability * * *." (§ 7602, Internal Revenue Code, 1954.)

The power may be abused. If so, the Courts will act "to prevent plain oppression." *Bolich* v. *Rabel*, 67 F. 2d 894, 895 (2nd Cir. 1933). Thus, where a summons was issued in aid of collection of taxes at a time when the statute did not enumerate that purpose as one for which the summons power could be invoked, the Court of Appeals for the Second Circuit directed that the summons be quashed. *Rasquin* v. *Maccini*, 72 F. 2d 698 (2nd Cir. 1934).

Not even the gathering of information for use in defending a tax refund suit will justify the use of the summons power. So the Court of Appeals for the First Circuit has held. "We do not think the Commissioner may use his powers of examination to aid the government representative as a litigant in civil proceedings." *Pacific Mills* v. *Kenefick*, 99 F. 2d 188, 189 (1st Cir. 1938).

Limitations on use of the summons power in connection with criminal matters have also been imposed. *Application of Myers*, 202 F. Supp. 212 (E. D. Pa. 1962). There the Court quashed a summons directed to a witness for the purpose of obtaining evidence for use in a criminal trial

against an indicted taxpayer. The leading case on this subject is *United States* v. *O'Connor*, 118 F. Supp. 248 (D. Mass. 1953), where an Internal Revenue Service summons was directed to a third-party witness for the purpose of obtaining evidence to aid the Department of Justice in the prosecution of a criminal case against an indicted taxpayer. Enforcement of the summons was denied on the ground that it would "sanction perversion of a statutory power"; the power was being "used in a direction entirely uncontemplated by the law givers" (118 F. Supp. at 251). As the District Judge pointed out:

> "So far as this Court knows, Congress has never in criminal matters vested the executive with an unrestricted subpoena power to uncover information which might aid in the enforcement of criminal statutes and the preparation of criminal cases." (118 F. Supp. at 250.)

The same reasoning applies here. As appears from the record, and by his own admission, the Special Agent is working under the supervision of the United States Attorney for the Southern District of New York (App. 24a). An indictment having been obtained, this supervision is obviously pointed to the procurement of evidence for use at the trial under the indictment. Assertions that the purpose of the Special Agent in seeking enforcement lies in another civil area are at worse lacking in candor, and at best serve merely to raise an issue of fact which should have been resolved at a hearing. In any event, if the government, in truth, seeks enforcement of the summonses here in question for purposes of civil tax collection procedures, then it would appear that an order should have been entered providing that the information in question might be utilized solely for civil tax purposes, but that such information obtained thereby would not be available in a pending criminal proceeding, and the accused's rights under the Federal Rules of Criminal Procedure would accordingly not

be violated. See, *Matter of Harris*, 221 U. S. 274, 55 L. Ed. 732 (1910).

The suggestion that there is some purpose in seeking enforcement relating to civil tax assessment runs contrary to the well established government policy against proceeding in a civil tax case while there is an indictment pending. The Court may take judicial notice of such policy. Treusch, *Twelfth Tax Institute*, 40, 63 (Matthew Bender & Co., U.S.C. School of Law, 1960). It is clear then that the agent here, acting as an arm of the Justice Department, is seeking to procure evidence in the preparation of the criminal case. Enforcement of the summons is not available, since such a purpose is not authorized by law.

The Court below sought to distinguish *Application of Myers*, 202 F. Supp. 212 (E. D. Pa. 1962) and *United States v. O'Connor*, 118 F. Supp. 248 (D. Mass. 1953), on the grounds that there the summonses had been issued after the return of the indictment. The distinction is without consequence. The issue here is not the issuance, but rather the *enforcement* of the summons. The relevant fact in both the *Myers* and *O'Connor* cases, *supra*, is the return of the indictment The return of the indictment, there, as here, tends to show that enforcement of the summons is sought for a purpose not permitted by law. In the instant case, such unlawful purpose in seeking enforcement is evidenced by the finding of the indictment, by the fact that the Special Agent is admittedly under the supervision of the United States Attorney and by presumed compliance by agents of the government with established governmental policy. Indeed, the purpose of seeking enforcement for use in a pending criminal case, as alleged here, stands unrefuted in the record.

In the *O'Connor* case, *supra*, Judge Wyzanski agreed with the contention of the third party witness that in this situation it would be ". . . against public policy for the judicial branch of the government to lend its support to the enforcement of the administrative subpoena." The

Court pointed out the purely limited purpose of the Treasury subpoena, stating that:

> "To encourage the use of administrative subpoenas as a device for compulsory disclosure of testimony to be used in presentments of criminal cases would diminish one of the fundamental guarantees of liberty. Moreover, it would sanction perversion of a statutory power. The power under § 3614 [now § 7602] was granted for one purpose, and is now sought to be used in a direction entirely uncontemplated by the lawgivers. The limitations implicit in every grant of power are that it will be used not colorably, but conscientiously for the realization of those specific ends contemplated by the donors of the power" (Brackets supplied) (118 F. Supp. at 251).

The rule in the *O'Connor* case has been specifically approved by the United States Court of Appeals for the Ninth Circuit in *Boren* v. *Tucker*, 239 F. 2d 767, 772 (9th Cir. 1956).

With the exception of the decision below, no Court has ever held that an administrative Internal Revenue Service summons may be properly and lawfully used for the purpose of assisting the Executive branch of the government, i.e., the United States Attorney, in the preparation of a criminal tax case and for obtaining additional evidence to sustain a pending criminal indictment.

CONCLUSION

For the reasons stated, the petitioners respectfully pray that the Writ of Certiorari be granted.

Respectfully submitted,

BORIS KOSTELANETZ, Esq.,
Attorney for Petitioners.

JULES RITHOLZ,
JON H. HAMMER,
of Counsel.

APPENDIX

Opinion Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 172—September Term, 1962

(Argued October 25, 1962 Decided December 6, 1962)

Docket No. 27813

In the Matter of

MAGNUS, MABEE & REYNARD, INC.,

Appellant.

In the Matter of

HURDMAN & CRANSTOUN,
PERCY C. MAGNUS,

Appellant.

Before:

LUMBARD, *Chief Judge*,
SWAN and MOORE, *Circuit Judges*.

Joint appeal by Magnus, Mabee & Reynard, Inc. and Percy C. Magnus from orders of Edward J. Dimock, Judge, denying applications by the respective appellants for orders quashing Internal Revenue summonses. Opinion not reported. Affirmed.

Opinion Below

MORTON L. GINSBERG, Assistant United States Attorney for the Southern District of New York, New York, N. Y. (Vincent L. Broderick, United States Attorney for the Southern District of New York, and David R. Hyde, Assistant United States Attorney, on the brief) *for appellee.*

CORCORAN, KOSTELANETZ, GLADSTONE & LOWELL, New York, N. Y. (Boris Kostelanetz, Jules Ritholz, Jon H. Hammer, New York, N. Y., of counsel), *for appellants.*

MOORE, *Circuit Judge*

This is an appeal from an order denying the quashing of Internal Revenue Service summonses issued on June 19, 1961, under Section 7602 of the 1954 Internal Revenue Code, directed to Magnus, Mabee & Reynard, Inc. (the corporation) and to Hurdman & Cranstoun (the accountants), requiring them to produce certain records relating to Percy C. Magnus and Margaret A. Magnus (the taxpayers) whose tax liabilities are under investigation. This is the second time these summonses have been before this court on a motion to quash. The first attack on the summonses was made by the taxpayers who moved to quash the summonses on June 29, 1961. Their application was denied by Judge Dimock on July 14, 1961, and reargument was denied (196 F. Supp. 127). The taxpayers appealed. The decision below was affirmed in an opinion by this Court on February 13, 1962 (299 F. 2d 335). Petitions for rehearing and rehearing *in banc* were denied. A stay was granted on April 4, 1962, by Mr. Justice Harlan pending application

for a writ of certiorari. On April 10, 1962, ten months after the summonses were originally issued, an indictment was filed charging Percy Magnus with tax evasion and failure to file returns. Thereafter, certiorari was denied by the Supreme Court on June 11, 1962 (370 U. S. 918). The corporation then sought on July 17, 1962, to stay enforcement and quash the summons directed to it, and the taxpayer Percy C. Magnus sought similar relief against the summons directed to the accountants. Both applications were denied in an opinion by Judge Dimock on September 19, 1962, and it is this ruling that is the subject of this appeal.

The appellant corporation is not the taxpayer. The records specified in the summons are the corporation's, not the taxpayer's. From a procedural viewpoint, the petition to quash the summons directed to the corporation was made only by the corporation. The accountants to whom the other summons was directed made no motion to quash. The petition, in effect on behalf of the accountants, was made by the taxpayer himself. The appeals are taken by the corporation as to the summons directed to it and by Percy C. Magnus as to the summons directed to the accountants.

The background facts reveal that the taxpayer Percy C. Magnus who owns 80% of the stock of the corporation did not file income tax returns for the years 1948 through 1957 or pay any income taxes during this period. After investigation had been commenced, Percy C. and Margaret A. Magnus, his wife, filed delinquent returns for these years which disclosed a gross income for these years in excess of $1,280,000. The primary source of this income was derived from the corporation; the accountants, using the corporation's books, prepared the delinquent returns. Through the issuance of the summons, the revenue agents sought to obtain access to the corporation's books to ascertain what taxes, if any, should have been reported by

the taxpayers for the years in question and to relevant papers, records or documents used by the accountants in preparing the returns. The summonses were issued some ten months before the indictment was returned. They were issued by a Special Agent just beginning his investigation of the taxpayers' returns, at a time when no final conclusion had, or even could have, been made as to whether criminal action was indicated. However, due to delays resulting from appellant's efforts to prevent compliance, the government was forced to secure an indictment against the taxpayers before the summonses could be enforced in order to prevent the statute of limitations on criminal prosecutions from running. The question before us is whether the right to enforcement under those circumstances is thereby nullified and the government forced to resort solely to Rule 17 of the Federal Rules of Criminal Procedure.

Section 7602 authorizes the Secretary of the Treasury or his delegate to issue a summons for the examination of books, papers and other documents and records

> "For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, * * *"

The taxpayer, Percy C. Magnus, claims that, since he has been indicted, albeit some ten months subsequent to the issuance of the summonses, the investigative power of the government must be limited exclusively to the discovery and inspection provisions of Rule 17 of the Federal Rules of Criminal Procedure and that once an indictment has

been returned, service *or* enforcement of such summonses is absolutely foreclosed. For this proposition appellant relies heavily on *United States* v. *O'Connor*, 118 F. Supp. 248 (D. Mass. 1953) and *Application of Myers*, 202 F. Supp. 212 (E. D. Pa. 1962). *O'Connor* involved a summons directed to an accountant of the taxpayer under investigation. A Special Agent had completed his investigation, turned his report over to higher authorities and an indictment had already been returned when the Special Agent issued a summons against the accountant. The Special Agent there admitted that the summons was for the purpose of criminal prosecution and that he had no matter involving the taxpayer presently pending before him when the summons was issued. In denying a government petition to enforce the summons, Judge Wyzanski was of the view that the pre-trial discovery powers of the government in criminal cases was severely limited and that the primary body for the compulsory disclosure of documents before trial is the Grand Jury. He further stated that:

> "To encourage the use of administrative subpoenas as a device for complusory disclosure of testimony to be used in presentments of criminal cases would diminish one of the fundamental guarantees of liberty. Moreover, it would sanction the perversion of a statutory power. The power under § 3614 [now Section 7602] was granted for one purpose, and is now sought to be used in a direction entirely uncontemplated by the lawgivers." (118 F. Supp. 248, 251).

The *Myers* case, which involved a summons issued several days before the criminal prosecution was set for trial, is of a similar effect.

Opinion Below

Under the Federal Rules, discovery by the government is quite limited. Rule 16,[1] the general discovery provision, applies only to defendants. Rule 17(c)[2] was not intended to provide an additional means of discovery, but rather was meant to establish a liberal policy for the production, inspection and use of materials at the trial. *Bowmann Dairy Co.* v. *United States*, 341 U. S. 214, 220-221 (1951).

As the Ninth Circuit in *Boren* v. *Tucker*, 239 F. 2d 767 (1956) made clear, where there is a possibility of tax fraud, the taxpayer is faced with either a 50% penalty or a criminal prosecution or both. In investigating whether a fraudulent return changes the taxpayer's liability, the Internal Revenue Service must weigh the possibility of criminal prosecution.

The mere securing of an indictment does not conclude the task of the examining revenue agents. The Secretary or his delegate is charged with the responsibility of "making a return where none has been made" and verifying such

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[1] Rule 16 provides that:

> Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable * * *

[2] Rule 17(c) provides that:

> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

returns as have been filed. The necessity of determining the correct tax liability and whether a 50% penalty for fraud should be imposed does not cease when an indictment is obtained because regardless of the outcome of any criminal trial, the tax and the penalty may still be payable (*Helvering* v. *Mitchell*, 303 U. S. 391). If a taxpayer were permitted to challenge every summons issued to a third person who might have books, records or information relating to the ascertainment of tax liability, the government's search for data to establish the truth or falsity of returns or the proper tax if no returns were filed would be completely blocked.[3] Adequate protection against violation of taxpayers' constitutional rights is afforded by safeguarding their own records against illegal search and seizure and by enforcement of the law against self-incrimination. However, to hold that information cannot be obtained under Section 7602 merely because it may be used in criminal proceedings would virtually write that Section out of the statute. Nor is there any conflict here between Rule 17 and Section 7602. They are not mutually exclusive. Each was designed to serve its own purpose. If the question of abuse of legal process arises, as the court may have believed to have been present in the *O'Connor* case, the courts can deal with such situations. Certainly such facts are not present here.

To prevent enforcement of such summonses because compliance was resisted for such a lengthy period that the government was forced to return an indictment to prevent

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[3] "A taxpayer may refuse to file any return whatever and take his chances; in that case he may stand upon his constitutional privileges against producing any evidence against himself. But, when he files a return, he subjects his affairs to the scrutiny of the Treasury, which cannot otherwise check his statements. That repeated scrutiny may become very irksome nearly everybody knows from experience; but no constitutional difficulties arise, none at least unless the abuse is far more crying than here."

(*Bolich* v. *Rubel*; 2 Cir., 1933, 67 F. 2d 894 at p. 895.)

the criminal statute of limitations from running would encourage litigants to resist such summonses wholly for the purpose of delay. Without questioning the reasons for appellants' tactical efforts in this case, the fact remains that to quash the summonses under these facts would lead to that result. The appellants here failed to file any returns until September, 1959, for the years 1947 through 1957, subsequent to the commencement of an examination into their affairs by the Internal Revenue Service. The summonses as originally issued came well within the purposes designated in the statute, and we deem the time of issuance to be the significant date on which to base a determination of the validity of a Section 7602 summons.

The government argues that the corporation has standing only to raise objections directly affecting it and that the taxpayer, Percy C. Magnus, has no standing to quash summonses served upon third parties when the summonses do not require the production of the taxpayer's property. Here the corporation would have standing to object to the enforcement of a summons issued for a purpose outside of the scope of § 7602, to enforcement which would constitute an unreasonable search and seizure under the Fourth Amendment and to such vagueness in description of papers and documents as would prevent compliance. In addition, third parties "have the protection always accorded to them by the courts which limits burdensome subpoenas, restrict them to relevant material and refuse to permit unwarranted searches and seizures." *Application of Magnus*, 299 F. 2d 335, 337 (2 Cir., 1961), cert. denied 370 U. S. 918 (1962). However, the facts do not support objection on any of these grounds.

The taxpayer has standing to object only if the use of the summons is an impermissible ruse to obtain the taxpayer's books and records or other material or information in violation of the taxpayer's constitutional rights. Again,

however, no facts have been adduced by the taxpayer to show any such purpose. To the contrary, as previously mentioned, the summonses were issued some ten months before the indictment.

One additional problem is presented for disposition on this appeal. The summons issued against the corporation is extremely broad. It calls for the production at the office of the Internal Revenue Agent of the following books and records for the years 1947 to 1957: (1) General Ledger; (2) General Journal; (3) Cash Receipts Book; (4) Cash Disbursements Book; (5) Bank Statements and Cancelled Checks; (6) Stock Certificate Book; (7) Minute Book.

However, we cannot be certain of the exact direction of the agent's search at the present time. The judge below, in anticipating this problem, indicated that if satisfactory arrangements could not be made by the parties, "an application for directions can be made to the court." We think this is the best way to deal with this situation. A considerable degree of discretion should be vested in the district courts to work out the appropriate limitations on which records are subject to investigation and the best location of such an inspection for all concerned. It may well be that the examinations can be conducted at the offices of the corporation and the accountants. If the parties are unable to agree, the district judge is empowered to find that solution leading to the most efficient examination of such records consonant with the least possible interference with the everyday conduct of the corporation's business.

Affirmed.

LUMBARD, *Chief Judge*—Concurring.

I concur with my brothers in affirming the ruling below and in their resolution of the substantive issues presented on this appeal. Because I am troubled by the growing practice of attempting to impede tax investigations by a series of oppositions to the government's subpoenas, I deem it advisable to state my views regarding the standing of these appellants to raise the objections which they assert.

The corporation objects to enforcement of the summons served on it on the following grounds:

> "1. Enforcement of the summons is sought for a purpose outside the scope of the statute authorizing the use of the summons;
>
> "2. Enforcement of the summonses [sic] would permit pre-trial discovery in violation of the Federal Rules of Criminal Procedure;
>
> "3. Inspection of the corporation books would violate the provisions of the Internal Revenue Code regulating such inspections;
>
> "4. The description of the documents in the summons lacks reasonable certainty and the documents described are not material and relevant to the inquiry."

Brief for Appellants, pp. 3-4. The taxpayer objects to enforcement of the summons served on the accountants only on the first two grounds stated. Since each appellant has standing to assert only those objections which affect rights personal to it or him, I would hold that the corporation has standing to raise grounds (1), (3), and (4), above, and that the taxpayer has standing to raise only ground (2).

It is, of course, appropriate for a party served with a summons of the Internal Revenue Service pursuant to

§ 7602 of the Internal Revenue Code to object to its enforcement on the ground and that the Service has exceeded its statutory authority; the Service has only that power which the statute confers. See *Foster* v. *United States*, 265 F. 2d 183, 187 (2 Cir.), cert. denied, 360 U. S. 912 (1959); *Hubner* v. *Tucker*, 245 F. 2d 35, 39 (9 Cir. 1957). Since the first objection asserts that the summons served on the corporation exceeds the authority conferred by § 7602, and the third asserts that the summons disregards the limitation on that authority expressed in § 7605(b) of the Code, the corporation has standing to raise both of those objections. It is also proper for the corporation to raise the fourth objection, which pertains to claimed rights of the corporation itself. As we said at an earlier stage of this protracted litigation, third parties who become involved in tax investigations of another "have the protection always accorded to them by the courts which limit burdensome subpoenas, restrict them to relevant material and refuse to permit unwarranted searches and seizures." *Application of Magnus*, 299 F. 2d 335, 337 (2 Cir.), cert. denied, 370 U.S. 918 (1962).[1]

The second ground for objection raises essentially the same issues as the first, inasmuch as it asserts in effect that the purpose for which enforcement is sought lies without the statutory authorization. But the right on which it focuses is the right of the taxpayer to be free of pre-trial discovery by the government beyond that allowed by Rule 17 of the Federal Rules of Criminal Procedure. The corporation has no stake in the conduct of the criminal prosecution against the taxpayer, and lacks standing to protest against a violation of his rights. Compare cases in which the taxpayer has been denied standing to assert the rights

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[1] Cases in which the taxpayer was not permitted to object on such grounds to the enforcement of a summons served on a third person, e.g., *Foster* v. *United States*, supra, are inapposite.

of a third person. *Eg., Application of Magnus, supra; Foster* v. *United States, supra.*

The taxpayer has no standing to object to enforcement of the summons served on the accountants on the first ground above. We have already held that a taxpayer may not assert the constitutional rights of another sought to be examined in connection with the former's tax liability. *Foster, supra,* at 187-88. That ruling is applicable here, where the taxpayer claims that a third-party summons is unauthorized by statute. He does, however, have the immediate, personal interest necessary for standing to raise the objection that enforcement of the summons against the accountants will constitute improper pre-trial discovery in the criminal action now pending against him. Compare my concurring opinion in *Foster, supra,* at 189.

Ordinarily, a summons "is personal to the person to whom it is directed and strangers have no standing either to substitute themselves for the person to whom it is directed, or to quash it." *Albachten* v. *Corbett*, 156 F. Supp. 863, 864 (S. D. Cal. 1957). And, as in this case with respect to the summons served on the corporation, the person summoned can, if he chooses, make an indicted taxpayer's objection for him in the form of the first objection above. This was the procedure used in *Application of Myers*, 202 F. Supp. 212 (E. D. Pa. 1962), and *United States* v. *O'Connor*, 118 F. Supp. 248 (D. Mass. 1953). But if the person summoned chooses not to contest enforcement, a taxpayer's rights in a pending criminal action might go unprotected unless he is permitted to assert them in the enforcement proceedings. The rules of standing are not so rigid that a court whose authority is sought in aid of a summons must keep its doors closed to the taxpayer in such a situation. Neither the taxpayer nor the government would be well served by postponing until trial a hearing of the claim that pre-trial discovery violated the Federal Rules of Crim-

inal Procedure; at that stage it might be very difficult to unravel properly obtained evidence from that which, directly or indirectly, was obtained by allegedly unauthorized means. At least in cases like the present, where the objection is not otherwise raised, a taxpayer who has already been indicted should be permitted to object to enforcement of a third-party summons on the ground that enforcement would permit the government to make unauthorized pre-trial discovery in the criminal proceeding pending against him. The question whether, in a case where the third person asserts the objection, the taxpayer must be permitted to intervene or can be kept out or confined to presenting his views as amicus curiae is not raised by this appeal.[2]

Since in my view one or the other of the appellants has standing to raise each of the objections set out above, it is appropriate for me to record my concurrence on the merits.

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[2] In *United States* v. *O'Connor*, *supra*, the third person did raise the objection. Judge Wyzanski denied the taxpayer the right to intervene but allowed him to present his views by counsel as amicus curiae.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 863

MAGNUS, MABEE & REYNARD, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 311 F. 2d 12.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1962. (Pet. App. 1a.) The petition for a writ of certiorari was filed February 25, 1963. The jurisdiction of this Court is invoked under 28 U.S.C., 1254(1).

QUESTION PRESENTED

Whether the taxpayer may enjoin enforcement of an Internal Revenue Service summons directing a third party to produce records relating to his tax liabilities when compliance with the summons has been resisted for such a prolonged period that the United States, in the interim, has been forced to obtain an indictment against the taxpayer to prevent the running of the statute of limitations.

STATUTE INVOLVED

Internal Revenue Code of 1954:

> SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.
>
> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear

before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(26 U.S.C. 1958 ed., Sec. 7602.)

SEC. 7605. TIME AND PLACE OF EXAMINATION.

* * * *

(b) Restrictions on Examination of Taxpayer.—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

(26 U.S.C. 1958 ed., Sec. 7605(b).)

STATEMENT

Percy A. Magnus, petitioner and taxpayer, owns over 80% of the stock of Magnus, Maybee & Reynard, Inc., the petitioner corporation, and derives most of his income from it (R. 28a-29a).[1] He filed no personal income tax returns for the years 1948 through 1957 until, in 1959, the Internal Revenue Service began an investigation of his affairs. There-

[1] The designation "R." will be used to refer to the appendix to petitioners' brief in the court of appeals.

upon, he filed delinquent returns showing gross income in excess of $1,280,000 (R. 28a, 31a) and paid the taxes which the returns indicated were due (R. 16a; Pet. 4-5).

On June 19, 1961, a special agent of the Internal Revenue Service issued two summonses (R. 11a-12a, 20a-21a) under authority of Section 7602 of the Internal Revenue Code of 1954, *supra*, p. 2. Both summonses were entitled: "In the matter of the tax liability of Percy C & Margaret A. Magnus." One was directed to the petitioner corporation and required the production of certain corporate records for the period 1948 through 1957. (R. 11a.) The other was directed to Hurdman and Cranstoun, a firm of accountants, and required the production of all records, work papers and other documents, for the same period, "relating to transactions with, for or on behalf of Percy C. Magnus or Magnus, Mabee & Reynard, Inc." (R. 20a-21a). Continuing litigation as to the propriety of these summonses has thus far prevented the government from obtaining compliance with either of them.

In the first round of litigation, the taxpayers, Percy C. and Margaret A. Magnus, filed a motion in the district court to quash the summonses on the ground that they were in support of an "unnecessary" examination or investigation, within the meaning of Section 7605(b) of the Internal Revenue Code of 1954 (*supra*, p. 3). The Court of Appeals for the Second Circuit, on February 13, 1962, affirmed the order of the district court denying the motion

to quash. *Application of Magnus*, 299 F. 2d 335 (C.A. 2). This Court denied certiorari on June 11, 1962, 370 U.S. 918.

On April 10, 1962, before this Court denied certiorari, an indictment was returned charging Percy C. Magnus with income tax offenses relating to the years 1955, 1956, and 1957. (R. 16a; Pet. App. 3a.) Thereafter, on July 13, 1962, the United States Attorney notified the corporation and the accountants by letter that the petition for certiorari had been denied and that they were "now required to comply" with the summonses served on June 19, 1961, by appearing with the required records before the special agent on July 18, 1962. (R. 13a-14a, 22a-23a.)

On July 18, 1962, the corporation filed an "application" in the district court, in the form of an affidavit by its vice-president, praying that the summons directed to it be quashed. (R. 1a, 5a-10a.) On July 20, 1962, Percy C. Magnus filed a similar "application" to quash the summons directed to the firm of accountants. (R. 1a, 16a-19a.) The latter firm was not and is not a party to the proceedings to quash.

The principal basis of the corporation's "application" was that, subsequent to the service of the summons, Percy C. Magnus had been indicted for failure to file tax returns and wilful attempt to evade income tax (R. 7a, 32a), and that "use of the Internal Revenue Service summons under the circumstances is a violation of law and an abuse of administrative process to obtain compulsory pre-trial discovery * * * in a criminal case" (R. 5a). Percy

C. Magnus based his motion on the same ground. (R. 16a-18a, 35a-36a.)

On September 19, 1962, the district court denied both motions. (R. 32a-36a.) The United States Court of Appeals for the Second Circuit affirmed on December 6, 1962 (Pet. App. 1a-9a), and both the corporation and Magnus now petition for a writ of certiorari to review this judgment.

ARGUMENT

Petitioners argue that the court of appeals erred in permitting the federal prosecutor to circumvent the statutory limitations upon the government's right to pre-trial discovery, and in permitting the Internal Revenue Service to enforce an administrative summons for purposes outside the scope of Section 7602. There is no merit in these contentions. Section 7602 authorizes the issuance of a summons

> [f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, * * *

Here summonses were issued by the special agent to the taxpayer's corporation and to the accountants (who had prepared his delinquent returns) for the purpose of determining whether the returns were correct (R. 29a-31a). Ten months later, the government was forced to return an indictment against the

taxpayer in order to prevent the running of the statute of limitations. But the responsibility of the examining agent is not exhausted, nor does a summons under Section 7602 become unenforcible, merely because an indictment has been returned. On the contrary, in order to establish the correct tax liability and whether the 50% civil fraud penalty should be imposed, the agent is required to report to his superiors all unreported income disclosed by his investigation regardless of whether a criminal case is developed (R. 30a). And here the special agent was unable to complete his report without the records sought by the summonses.[2]

To hold that a revenue agent is powerless to obtain information under Section 7602 merely because that information might ultimately be used in a criminal proceeding would, as the court below noted, "virtually write that Section out of the statute" (Pet. 7a). It is clear, moreover, that an Internal Revenue summons will be enforced by the courts so long as it has been issued, as here, for "the purpose of ascertaining the correctness of any return" (see 26 U.S.C. 7602, *supra*, p. 2), even though the Internal

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[2] Admittedly, the normal statute of limitations already bars assessment of civil tax deficiencies as to most of the years involved. But in case fraud is discovered, the assessment may, of course, be made at any time. Section 6501(c)(1) and (2), Internal Revenue Code of 1954, 26 U.S.C. 6501(c)(1) and (2). The return of the indictment makes it clear that the special agent already has *some* evidence of fraud, but he would hardly be fulfilling his function properly if he completed his report without examination of the books of the corporation, the source of petitioner Magnus' income.

Revenue Service may have other purposes in mind at the same time. *Boren* v. *Tucker*, 239 F. 2d 767, 772-773 (C.A. 9); *Lash* v. *Nighosian*, 273 F. 2d 185, 187-188 (C.A. 1), certiorari denied, 362 U.S. 904. If a summons, valid when issued, were to become unenforcible the moment an indictment is returned, delinquent taxpayers would have a strong incentive to do precisely what was attempted here —resist the enforcement of the summons until prosecution for criminal tax evasion is barred by the statute of limitations.

The two district court cases relied upon by petitioner, *United States* v. *O'Connor*, 118 F. Supp. 248 (D. Mass.), and *Application of Myers*, 202 F. Supp. 212 (E.D. Pa.), are inapposite. In *O'Connor*, the summons was issued after the return of the indictment and after the agent had already completed his investigation and turned his report over to higher authorities. And the agent admitted that the sole purpose of seeking information was to further the criminal prosecution already under way. In *Myers*, similarly, the summons was issued only a few days before the criminal prosecution was set for trial, and the court found that its sole purpose, openly avowed, was to obtain information in aid of the government's case on the indictment.

2. It is doubtful that a district court has jurisdiction to entertain an independent plenary action to enjoin the enforcement of an Internal Revenue summons. See *Reisman* v. *Caplin* (C.A. D.C.), C.C.H. ¶ 9255, decided February 7, 1963; but see *Applica-*

tion of Colton, 291 F. 2d 487 (C.A. 2).[3] Moreover, even if such an action could be brought by the party (here, the petitioner corporation) to whom the summons was addressed, and who might be exposed to criminal penalties if he failed to comply (under 26 U.S.C. 7604(b) or 26 U.S.C. 7210; see *Colton*, *supra*), it would not follow that any other person (*e.g.*, the taxpayer here) would have such standing. Since the taxpayer's motion was based solely upon the contention that the summons would accord the United States improper pre-trial discovery in its criminal action against the taxpayer, the motion should be treated as ancillary to the pending criminal proceeding. Viewed in that light, however, its denial is an interlocutory ruling and hence unappealable. *DiBella* v. *United States*, 369 U.S. 121. Furthermore, the petitioner corporation, even granting *arguendo* its right to bring a plenary action, nonetheless does not have standing to complain of the threatened injury to its stockholder, the taxpayer.

Finally, even if petitioners could institute a plenary civil action to quash the summonses, they clearly could not do so by means of the summary procedure invoked here.

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[3] During oral argument in *In re Turner*, 309 F. 2d 69, Judge Friendly, who wrote the Second Circuit's decision in *Colton*, specifically invited government counsel to reargue the *Colton* decision, and this invitation was repeated by Chief Judge Lumbard at a subsequent argument (*United States* v. *McDonald*, decided February 25, 1963, reported at 11 A.F.T.R. 2d 899). The government intends to present the issue again as soon as a suitable case reaches the Second Circuit.

3. A plenary civil action to quash the summonses could not properly be brought by means of the summary procedure instituted by petitioners here. In *New Hampshire Fire Ins. Co.* v. *Scanlon*, 362 U.S. 404, a case which began with the filing of a "petition" to quash certain notices of levy and the issuance of an order to show cause to the District Director of Internal Revenue, this Court held that since no proper complaint had been filed and no summons issued, the proceeding was without authorization under the Federal Rules of Civil Procedure. 362 U.S. 406-407. The present record manifests the same disregard for the provisions of the Federal Rules governing the institution of a plenary civil action. This case, too, was commenced by the filing of "applications" and the issuance of orders to show cause. (R. 3a-5a, 15a-16a.) The "applications" named no defendants (R. 3a, 15a) and contained no jurisdictional statement in its body, as a "complaint" is required to do under the Federal Rules.[4] And no summons was issued to the Attorney General, to the United States Attorney, or to anyone in the Internal Revenue Service,[5] although these officials of the United States were obviously the intended defendants. What petitioners apparently did was to invoke a summary procedure appropriate to ancillary motions in plenary actions.[6] And, as we have pointed out, if petitioner

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[4] Rules 1, 2, 3, 8(a)(1), 10(a).

[5] Rule 4(a), (c), (d)(4) and (5).

[6] Since there was no pending action, the district court clerk entered the "applications" on the Miscellaneous Docket. (R. 1a.)

Magnus should insist that his "application" was made as part of the criminal case pending against him, the ruling on it would be nonappealable. *DiBella* v. *United States*, *supra*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1963.

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